STATE OF MICHIGAN

COURT OF APPEALS

CITY OF GROSSE POINTE PARK,

Plaintiff-Appellee/Cross-Appellant,

v

MICHIGAN MUNICIPAL LIABILITY & PROPERTY POOL,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
October 30, 2003

No. 228347
Wayne Circuit Court
LC No. 98-806998-CK

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

In this action for declaratory judgment involving an insurance coverage dispute, defendant Michigan Municipal Liability and Property Pool[1] (the Pool) appeals as of right the circuit court's order granting plaintiff City of Grosse Pointe Park (the Park) summary disposition on its breach of contract claim and awarding the Park indemnification for the Park's share of the settlement amount in an underlying class-action. The Park cross-appeals several rulings. Because we conclude that questions of fact remained regarding the parties' construction of the pollution exclusion and whether the Pool was estopped from asserting the absolute pollution exclusion clause, we reverse the grant of summary disposition to the Park and remand for further proceedings. We also direct that the court address exclusions (b) and (c) to Coverage D. In all other respects, we affirm.

Since 1940 or earlier, pursuant to written agreements with the City of Detroit,[2] the Park utilized Detroit's sewer system and discharged combined sewage and stormwater flow to Fox

[1] Defendant is a group self-insurance pool created by certain municipal corporations pursuant to MCL 124.5.

[2] We glean from the record that as far back as the 1910s, plaintiff City of Grosse Pointe Park and the City of Detroit entered into agreements providing that the Park could use certain Detroit sewer outlet facilities to dispose of wastewater. Under a 1938 agreement, the Park purchased the right to pump combined sewage into an interceptor sewer for transport to the Detroit Sewage Treatment Plant. The 1938 agreement provided that the Park could pump a maximum of eighty-

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Creek, a neighborhood creek in Detroit just across the Park border, during storm events when the combined sewer flow (CSF) exceeded the park's storage capacity. Fox Creek area residents complained numerous times, dating back to the 1940s, regarding the discharge. Beginning around the 1970s, the Park obtained permits to discharge combined sewage overflow to Fox Creek under the National Pollutant Discharge Elimination System (NPDES), to comply with the Federal Water Pollution Control Act (Clean Water Act), 33 USC 1251 *et seq*.

Beginning in 1985, through and including 1995, the Park purchased from the Pool one year "occurrence based" commercial general liability (CGL) policies. The instant case involves the policy issued on August 1, 1994, and effective from that date until August 1, 1995.

Underlying the instant case is *Etheridge et al v Grosse Pointe Park*, a class action in which the plaintiffs sought damages and injunctive relief[3] as a result of the Park's discharge of CSF into Fox Creek, along and near which the *Etheridge* plaintiffs lived. The City of Detroit was also named as a defendant in the *Etheridge* action.

The *Etheridge* complaint was filed on September 14, 1995.[4] The Pool provided a defense to the Park under a reservation of rights letter dated October 6, 1995, which letter quoted the CGL's pollution exclusion clause, among other provisions. See n 7, *infra*. The *Etheridge* suit proceeded, a special facilitator was appointed in June or July 1997, and after facilitation hearings on August 10 and 26, 1997, and while dispositive motions were pending, a settlement in principle was reached, under which the Park and City of Detroit each agreed to pay the *Etheridge* plaintiffs $1.9 million, and to take steps needed to terminate sewage discharge into Fox Creek.

After the Pool notified the Park that it would deny indemnification coverage, the Park filed the instant suit asserting that the Pool was obligated to pay the $1.9 million settlement.[5] On the parties' cross-motions for summary disposition, the circuit court determined that the Pool was equitably estopped from asserting the absolute pollution exclusion because it had paid

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four cubic feet per second to the treatment plant and that the Park would construct a pump station and discharge pipe to pump and discharge the Park's excess sewage into the Fox Creek. That construction was completed in 1940.

[3] The *Etheridge* record is not before us, but various documents from that case were submitted in the instant case. The *Etheridge* suit alleged trespass, nuisance, trespass/nuisance, gross negligence, unconstitutional taking of property, and third-party beneficiary claims arising under contract(s) between the Park and Detroit.

[4] The class was certified by order entered December 11, 1995.

[5] The Park's complaint alleged breach of contract, breach of fiduciary and other duties, promissory and equitable estoppel, and violation of the Michigan Consumer Protection Act (MCPA).

sewage backup claims of the Park's residents in the past.[6] The court granted the Park's motions for summary disposition on Coverages A and D, finding the discharges constituted "occurrences" under the policy, and ordered the Pool to pay the Park the amount of the *Etheridge* settlement. This appeal and cross-appeal ensued.

I

The Pool argues that there was no genuine issue whether the absolute pollution exclusion precluded coverage in *Etheridge*, and that the circuit court's application of equitable estoppel to prevent the Pool from asserting the pollution exclusion constituted error.

We review the circuit court's denial of defendant's motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Interpretation of contractual language is an issue of law this Court reviews de novo. *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). An insurance policy must be enforced in accordance with its terms. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Where there is no ambiguity, this Court will enforce the terms of the contract as written. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). Exclusionary clauses are strictly construed in favor of the insured; however, clear and specific exclusions must be given effect. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

The Pool's reservation of rights letter quoted the absolute pollution exclusion.[7] Section V of the policy sets forth "general exclusions" applicable to all coverages, including an absolute pollution exclusion stating that coverage does not apply to:

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[6] The court dismissed the Park's count II (duty of insurer to investigate and provide timely notice of its coverage decision to insured), granted the Pool's motion to dismiss count VI (violation of MCPA), and dismissed the Park's counts III through V without prejudice, as moot.

[7] The reservation of rights letter stated in pertinent part:

> Our review of the legal Complaint reveals that if judgment or damages are awarded based on certain allegations, the judgments based on those allegations may not be covered by the coverage contract. The purpose of this letter is to point out the allegations and exposures that may not be covered, and to formally advise you that we will defend the entire action, with your cooperation, but will not pay any damages not covered by our contract. In legal terms, we are reserving our rights to restrict payments to those owed under the coverage contract.
>
> Because you may have exposure to damages not covered by the coverage contract, you have the right to hire your own attorney to work with Plunkett & Cooney in the defense of this Complaint. If you choose to hire an attorney, the costs of that attorney will be your responsibility.

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In the Complaint, The plaintiff [sic] are alleging that the City of Grosse Pointe Park has been discharging water and sewage into the Fox Creek. As a result of this discharge, they are alleging property damage to numerous home [sic] on Ashland in Detroit. They are also alleging the City of Grosse Pointe Park knew that their actions would cause property damage to the plaintiff's homes. As a result of these allegations, we must refer to COVERAGE D – PUBLIC OFFICIALS ERRORS & OMISSIONS, exclusion a., which states:

> 2. Exclusions
>
> a. any Claim or Suit for Damages which result [sic] from a Wrongful act committed intentionally with knowledge of wrongdoing.

In addition, we must refer you to SECTION V – GENERAL EXCLUSIONS, exclusions d. and f., which state:

> In addition to the specific exclusions in SECTION I – COVERAGES A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY, B – PERSONAL AND ADVERTISING INJURY LIABILITY, C – MEDICAL PAYMENTS, D - PUBLIC OFFICIALS ERRORS AND OMISSIONS, AND E – AUTO, this coverage also does not apply to:
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> d. bodily Injury or Property Damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
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> (1) At or form [sic] any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Member;
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> (2) At or from any premises, site or location which is or was at any time used by or fro [sic] any Member or others for the handling, storage, disposal, processing or treatment of waste;
>
> (3) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or fro [sic] may [sic] Member or any person or organization for whom you may be legally responsible, or
>
> (4) At or from any premise, site or location on which any Member or any contractors or subcontractors working directly or indirectly on any Member's behalf are performing operations:

(continued…)

d. Bodily Injury or Property Damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(…continued)

> (a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such Member contractor or subcontractor; or
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> (b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.
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> * * *
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> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> * * *

We also must refer you to the definition of "occurrence" which states:

> "Occurrence" means an accident or event, including continuos [sic] or repeated exposure to substantially the same general harmful conditions which results in Bodily Injury or Property Damage which is neither expected nor intended from the standpoint of the Member. Under Coverage A, Coverage D and Coverage E, Occurrence includes intentional acts, including but not limited to assault and better [sic battery], if committed by the Member while in the performance of the Member's duties to protect persons or property.

Please be advised that if there is any judgment against the City of Grosse Pointe Park for eminent domain, a discharge of any pollutants**,** or an intentional act, the Michigan Municipal Liability & Property Pool reserves the right not to indemnify Grosse Pointe Park for said damages.

Our current position is based on the facts as alleged in the legal Complaint and our understanding of the facts to date. If we have misunderstood any facts, if you disagree with our position, or if you have any questions, please contact the undersigned.

* * *

> (2) At or from any premises, site or location which is or was at any time used by or for any Member or others for the handling, storage, disposal, processing or treatment of waste;
>
> (3) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any Member . . .

* * *

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

A

The circuit court concluded that the Pool was equitably estopped from asserting the pollution exclusion because it consistently had paid claims of the Park's residents arising from combined sewage flow backing up into their basements,[8] and the Park was entitled to rely on the Pool's having paid this type of claim.

In *Michigan Millers Mut Ins Co v Bronson Plating*, 197 Mich App 482; 496 NW2d 373 (1992), aff'd 445 Mich 558; 519 NW2d 864 (1994), the defendant sought discovery from the plaintiff insurers of similar claims the insurers had handled involving environmental damage. The circuit court denied the defendant's motion to compel on the basis that the discovery sought was immaterial and irrelevant. This Court disagreed, stating in pertinent part:

> Bronson claims that information regarding how the insurers handled other environmental claims is relevant to show whether the term "suit" in the contracts is ambiguous, because [if] the information shows that the insurers had previously defended insureds in environmental cases in the absence of a complaint filed in a court of law, then extrinsic evidence would tend to show that the insurers' construction of "suit" is wrong, or at least ambiguous. We agree.

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[8] The Park maintained a combined sewer system in which stormwater and sanitary water were captured and combined together. On occasions when excessive rain caused the sewer flow to exceed the processing and storage capacity, including the flow allowed by the contract with Detroit, operators were required to divert the water out of the system and into Fox Creek. When the flow was excessive, but the measures were not taken to divert the water flow out of the system, the sewage would back up into basements, rather than flow into Fox Creek. It is undisputed that the Pool paid claims arising from these backups on a regular and repeated basis, both for the Park and its other insureds. In 1994, seventy-two such claims were made and paid under the Park's policy; from 1990 to 1996, the Pool covered approximately two hundred such claims for its other insureds.

> Michigan Millers claims that the information sought by Bronson is unnecessary, basing its argument on two evidentiary principles pertinent to the interpretation of contracts. If the term "suit" is unambiguous, then its construction is a matter of law for the court and extrinsic evidence is not admissable [sic] to contradict its meaning. If an ambiguity is shown to exist, it is construed liberally against the insurer and in favor of coverage. Michigan Millers deduces that if the term "suit" is unambiguous, the information sought by Bronson cannot be used to contradict its meaning, while if the term is ambiguous, then Bronson would prevail by virtue of the second principle noted above.
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> This deduction ignores a third principle of evidence. *Extrinsic evidence is admissible to show the existence of an ambiguity*. This is the purpose for which Bronson argues it sought the information. Although material need not be admissible at trial in order to be discoverable, MCR 2.302(B)(1)(a), it must be relevant. *The materials sought by Bronson were relevant to show the insurers' prior interpretations of the term "suit."* The trial court's denial of Bronson's motion to compel production on the basis of lack of relevancy and materiality was thus an abuse of discretion. [197 Mich App at 494-495. Citations omitted. Emphasis added.]

While the circuit court unnecessarily engrafted concepts of equitable estoppel where the focus should have been on the meaning given by the parties to the pollution exclusion, the court did not err in its determination that the Pool's consistent prior interpretation of the exclusion as not applying to the escape of CSF was relevant to the meaning of that exclusion in the instant policy. *Michigan Millers, supra.* Although an insurance policy is a contract that must be read according to its terms, *McKusick, supra,* it is the intent of the contracting parties that controls, *Churchman, supra* at 566. Normally, the meaning of this clause would involve no question of fact; however, where the Park has presented evidence that the Pool has repeatedly and consistently interpreted the clause as not applying to the escape or discharge of CSF, a question of fact regarding the parties' intent as to the exclusion's applicability was presented.[9] The court erred, however, in ruling in the Park's favor as a matter of law.

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[9] The partial dissent concludes that extrinsic evidence of the parties' intent is not permitted because "straightforward application of the contract's plain language results in the inescapable conclusion that the parties intended to exclude coverage for waste water discharge, so the trial court's venture could only result in a finding *inconsistent* with the contract's clear language." [Emphasis in original.] The dissent thus begins with the premise that the parties' intent is clear from the contract and, therefore, even the most compelling evidence of a contrary intent, e.g., written contract negotiations addressing the subject, would be irrelevant. We cannot agree. The contract does not define "pollution" or "waste" as including wastewater, sewer water, or combined sewer flow (CSF). Considering that this is a policy specifically issued to municipalities, and thus CSF would be within the contemplation of the parties, we do not agree that the policy is so unambiguous that no extrinsic evidence of the parties' intent can be considered. As surely as the exclusion covers the instant facts, it covers the escape of the same CSF into the basements of residents. Yet, not only did defendant pay these claims as a matter of

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B

The question of equitable estoppel is a separate question that would arise if it is determined that the pollution exclusion does, in fact, apply.

In insurance cases, "[t]he application of waiver and estoppel is limited, and, usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593-594; 592 NW2d 707 (1999); citing *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 653-654; 177 NW 242 (1920), and *Lee v Evergreen Regency Cooperative*, 151 Mich App 281, 285; 390 NW2d 183 (1986). See also Anno: Comment Note: *Doctrine of estoppel or waiver as available to bring within coverage of insurance policy risks not covered by its terms or expressly excluded therefrom*, 1 ALR 3d 1139, 1144. Exceptions to the general rule have been found, however, as discussed in *Smit v State Farm Mut Ins Co*, 207 Mich App 674, 679; 525 NW2d 528 (1994):

> In *Lee* [*supra* at 287], this Court identified two classes of cases decided since *Ruddock* in which estoppel or waiver was applied to bring within coverage risks not covered by policy terms or expressly excluded from the policy:
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> > The first class involves companies which have rejected claims of coverage and declined to defend their insureds in the underlying litigation. In these instances, the Court has held that the insurance company cannot later raise issues that were or should have been

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course, in *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), in which our Supreme Court overruled *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), and concluded that local units of government are immune from trespass-nuisance claims arising out of sewer backups, the Court gave its decision prospective application only, recognizing:

> . . . . there has been extensive reliance on *Hadfield*'s interpretation of § 7 of the governmental tort liability act. In addition to reliance by the courts, insurance decisions have undoubtedly been predicated upon this Court's longstanding interpretation of § 7 under *Hadfield*: municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same. [465 Mich at 697.]

United States Fire Ins Co v Warren, 176 F Supp 2d 728, 732 (ED MI, 2001), also relied on by the dissent, preceded the Court's decision in *Pohutski, supra*, and simply relied on the holding of *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347; 559 NW2d 93 (1996), that the absolute pollution exclusion is clear and unambiguous. However, *McGuirk* so held in the context of a coverage dispute having nothing in common with the dispute here.

> raised in the underlying litigation. [Citations omitted] These cases are closely akin to the principle behind collateral estoppel . . . .
>
> The second class of cases allowing the limits of a policy to be expanded by estoppel or waiver despite the holding of *Ruddock* involves instances where the inequity of forcing the insurer to pay on a risk for which it never collected premiums is outweighed by the inequity suffered by the insured because of the insurance company's actions.

Plaintiff contends that the second exception applies here, and argues on appeal that:

> . . . the Park has been prejudiced by its reliance that coverage would be afforded in the *Etheridge* suit. The simple fact that the Park handled the lawsuit under the Pool's misleading and ambiguous statements regarding insurance coverage certainly affected the Park's management of the case. Because he believed insurance coverage would be forthcoming, City Attorney, Deason only concerned himself with issues related to the injunctive relief which would not be covered by insurance. Discovery and settlement discussions would have been conducted differently if the Park knew up front that the pool would decline the same type of coverage it had consistently provided in the past. Additionally, the Park would have taken different steps to financially prepare for an adverse judgment if it had known that coverage would be denied.[10]

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[10] Plaintiff's motion for partial summary disposition argued, in part:

> The Park never thought that the pollution exclusion claims in its insurance policies would be applied to the *Etheridge* case because the pollution exclusion clause had not been enforced when previous CSF claims had been submitted to the Pool by the Park. In almost every year since 1986, virtually all CSF backup claims that have been presented by the City to the Pool for coverage have been covered. Ex. 52. The exceptions are cases where the facts were clear that there was no liability on the part of the Park, as opposed to the Pool denying coverage under the Policy. *Id.* In 1994 72 claims were made, and all were paid. *Id.* Additionally, a request to defend and indemnify was made by the Park pursuant to the filing of the 1996 *Walters* lawsuit which involved CSF backup claims. That claim was also covered without exception.
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> * * *
>
> [T]he Pool concludes that the Park suffered no detriment. Once again, the Pool argues as if the year of choices and activity leading up to the facilitation hearings, all taken under the mistaken impression that the Pool would cover the claims, could be disregarded. It could not. Having foregone parallel litigation with the Pool to establish coverage, having declined to incur the expense to develop the factual basis supporting coverage through discovery, and having consumed

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We conclude that there were questions of fact regarding the second exception, and therefore whether the Pool is estopped from asserting the pollution exclusion clause. While the Pool provided a reservation of rights letter citing the pollution exclusion clause and stating that indemnification may be precluded, the Pool nevertheless continued to pay backup claims involving the same CSF. Further, the representative of the Pool who wrote the letter and who continued to monitor the litigation, set reserves and discussed with the attorney hired to represent the Park the *amount* of appropriate settlement authority, rather than *whether* any authority at all would be forthcoming. Plaintiff presented evidence that before *Etheridge* was filed and throughout the pendency of *Etheridge* in the circuit court, including the facilitation hearings that preceded the agreement in principle to settle, defendant paid numerous sewer backup claims brought under the Park's insurance policy. Further, the conduct of the Pool's agent directly involved in the *Etheridge* case could also be interpreted by a fact-finder as inconsistent with the reservation of rights letter's reliance on the pollution exclusion. A reasonable fact-finder could conclude that counsel retained by the Pool to represent the Park assumed or believed that indemnification would be forthcoming until approximately September 22, 1997, after the settlement in principle had been reached.

Under these circumstances, we conclude that a question of fact remained whether the Pool should be estopped from asserting the pollution exclusion, i.e., whether the inequity of forcing the Pool to pay on a risk for which it did not collect premiums is outweighed by the inequity suffered by the Park because of the Pool's actions.[11]

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> considerable resources of the court, facilitator Kaufman and the opposing parties on the facilitation, the Park had little choice but to accept the settlement. (Deason dep., p. 122). Even though it had not made financial arrangements to fund its portion of the settlement, the Park faced intransigent plaintiffs, the loss of its credibility and, potentially, the loss of ongoing cooperation from the other parties as the *Etheridge* case proceeded. *Id.* The Park's detriment was substantial. It lost the chance to develop the case for coverage as the *Etheridge* lawsuit proceeded and it lost the chance to pursue a different strategy in the *Etheridge* case**.**

[11] The partial dissent concludes that we have misapplied the estoppel doctime. *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999), relied on by the dissent, does indeed discuss the waiver/estoppel doctrine in the context of insurance coverage. It holds that the doctrine is not properly applied where the insurer notifies the insured, but not the plaintiff in the underlying litigation, that it is proceeding under a reservation of rights. The case sets forth the same principles set forth in the majority opinion, and does not state the standard as requiring "egregious, inequitable action by the insured." Further, we acknowledge that *Calhoun v Auto Club Ins Ass'n*, 177 Mich App 85; 441 NW2d 54 (1989), and, indeed, other cases, hold that an insurer will not be estopped from asserting a defense simply because it has earlier paid benefits on the claim. We find these cases distinguishable, however, because the rationale that an insurer may rationally make payments on a suspect claim rather than incurring the greater cost of litigating has been applied in the context of a single claim. Here, the insurer repeatedly and consistently paid on multiple claims that would be subject to the same exclusion, without ever

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The circuit court's conclusion that the Pool was estopped as a matter of law from asserting the pollution exclusion clause went too far, as reasonable minds could differ on that question. We therefore remand for further proceedings.

II

The Pool also argues that the circuit court erred as a matter of law in denying its motion for summary disposition under Coverage A. This Court reviews de novo the circuit court's denial of defendant's motion and grant of plaintiff's motion on this issue pursuant to MCR 2.116(C)(10). *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

Coverage A provides insurance coverage for bodily injury and property damage caused by an "occurrence," a term defined in the policy as:

> [A]n accident or event, including continuous or repeated exposure to substantially the same general harmful conditions which results in Bodily Injury or Property Damage which is neither expected nor intended from the standpoint of the Member. Under Coverage A, Coverage D and Coverage E, Occurrence includes intentional acts, including but not limited to assault and battery, if committed by the Member while in the performance of the Member's duties to protect persons or property.

We need not determine whether the releases constituted accidents or events resulting in bodily injury or property damage that was neither expected nor intended from the Park's statndpoint, because the definition of "occurrence" in this policy also includes "intentional acts . . . if committed by the Member while in the performance of the Member's duties to protect persons or property." The circuit court determined that plaintiff had a duty to provide sewer service and that the discharges to Fox Creek were committed in the performance of the plaintiff's duty to protect its citizens from sewer backups.

The Park argues that because it operates the sewer system, it must do so "for the safety of persons and property." As support for its argument, the Park cites to the Home Rule City Act, MCL 117.3(j). The act requires home rule cities to provide in their charters for the public peace and health and for the safety of persons and property. *Id*. Therefore, the Park argues, if it chooses to operate a sewer system, it has a duty to do so for the health and safety of its citizens and their property. The Pool counters that the Park has no duty to operate the sewer system at all; therefore, the discharges cannot have been committed in the performance of the Park's duties. The Pool relies on *Ahearn v Charter Twp of Bloomfield*, 235 Mich App 486, 494-495; 597 NW2d 858 (1999), which held that a township has no affirmative duty to continue providing sewer service. See also *McSwain v Twp of Redford*, 173 Mich App 492, 499-500; 434 NW2d 171 (1989) (finding no affirmative duty to construct a sanitary sewer). The Pool also relies on

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asserting the exclusion, and, after the exclusion was cited in a reservation of rights in the instant case, the insurer continued to pay such claims and engaged in other activities which could be seen as inconsistent with its reservation of rights.

the Home Rule City Act, MCL 117.4f, stating that a home rule city *may* provide for a sewage disposal system in its charter.

Assuming it is reasonable to read "duties" as narrowly as the Pool urges, it is equally reasonable to read it as applying where the insured undertakes to operate and provide a permissive service to its residents.[12] We conclude that the policy language is ambiguous in this regard. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 138; 610 NW2d 272 (2000). Therefore, the language must be construed against the insurer. *Id*. at 139.

There is no dispute that the Park chose to divert its excess sanitary flows to Fox Creek to avoid having the flows backup into its citizens' basements. We conclude that the discharges to Fox Creek were intentional acts committed by the Park while in the performance of its duty to operate its sewer system to protect its citizens' property and health – making the discharges "occurrences" pursuant to the policy. The circuit court properly denied the Pool's motion and granted the Park's motion for partial summary disposition on this issue.

III

The Pool also argues that the circuit court erred as a matter of law in denying its motion for summary disposition under Coverage D. The circuit court denied the Pool's motion and granted the Park's motion on this issue pursuant to MCR 2.116(C)(10). Therefore, this Court must review the evidence in a light most favorable to the nonmoving party, granting judgment as a matter of law if there is no genuine issue of material fact. *Hazle, supra,* 464 Mich at 461.

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[12] In *McSwain, supra*, 173 Mich App at 497-498, the Court observed:

> It is well-established that a governmental unit may be liable to a private landowner when, due to improper construction of a sewer or drainage system by the governmental unit, water or sewage is cast onto the property and causes damage. A succinct statement of the law is contained in *Seaman v City of Marshall*, 116 Mich 327, 330; 74 NW 484 (1898):
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> > There is no doubt of the authority of the city to establish a system of drainage for the benefit of the highway and the citizens, and it cannot be said that it must be sufficient for every possible emergency. But the city is required to use due caution, and if, through its negligence in not providing reasonably efficacious means to take care of the water that it should reasonably expect to accumulate by reason of its gutters, a person is injured by the overflow upon his premises of water collected by the sewers, and brought to such premises, and which would not otherwise have invaded them, the city is liable for the damages.

Coverage D, Public Officials Errors and Omissions, provides coverage for "Damages resulting from any Wrongful Act of the Member or any person for whose actions the Member is legally responsible." The following exclusions apply to coverage under this section:

a. any Claim or Suit for Damages which result from a Wrongful Act committed intentionally with knowledge of wrongdoing.

b. any Claim or Suit for Damages arising from Bodily Injury, sickness, mental anguish, disease or death of any person.

c. Any Claim or Suit for Damages for loss of, criminal abstraction of, Damage to or destruction of any tangible property or the Loss of use of such property by reason of the foregoing.

The circuit court, noting that it had limited the *Etheridge* plaintiffs to damages within three years of their complaint because of the statute of limitations, found no wrongdoing because the Park had a valid NPDES permit during the relevant period. The Pool asserts that the circuit court never made a ruling on the motion regarding the statute of limitations in the *Etheridge* case; therefore, the basis for the circuit court's ruling was factually incorrect.[13]

There is no evidence that the Pool received either a notice of violation or a cease and desist order from the DNR at any time after it received its initial NPDES permit for the Fox Creek discharge point in 1975. Therefore, it is unimportant whether the circuit court limited the Etheridge complainants' damages to a three-year period. Although the Pool argues that the Park violated federal law by failing to comply with permitting requirements under the Clean Water Act, it fails to present any objective proof of any violation from the agency responsible for monitoring permitted discharges.

The insurer bears the burden of establishing that an exclusion applies. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 160; 534 NW2d 502 (1995). The Park's discharges could not qualify as wrongful acts committed intentionally *with knowledge of wrongdoing* when the discharges were made in substantial compliance with an NPDES permit as required by federal law and with the full knowledge of the DNR or Department of Environmental Quality (DEQ).[14] Because defendant failed to establish that plaintiff discharged without a permit, or continued to discharge after receiving a cease and desist notice from the DNR or DEQ, we conclude that

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[13] When the circuit court stated that it had ruled on the statute of limitations during *Etheridge*, both plaintiff and defendant stated that the motion was merely under advisement; however, the judge stated that she specifically recalled the ruling. Although defendant argues that the *Etheridge* record will verify its argument and seeks permission to supplement the record on appeal, no verification is currently included in the record.

[14] Discharge permits used to be under the authority of the DNR but are now under the authority of the DEQ. MCL 324.3101.

exclusion (a) does not apply. Similarly, the Pool has failed to show that the general exclusion for willful violations of the law applies.

Defendant also asserts that coverage pursuant to Coverage D is precluded by exclusions (b) and (c), excluding damages arising from bodily injury and property damage. The Pool raised only exclusion (a) in its reservation of rights letter, and it is unclear when the Pool raised exclusions (b) and (c) for the first time. There was no reference to these sections in the Pool's reservation of rights letter, letter denying coverage, or answer. However, the Pool raised exclusions (b) and (c) in its brief in support of motion for summary disposition. The circuit court did not address the applicability of these exclusions, or whether the Pool waived them under the case law. *Kirschner, supra; Smit, supra.* These issues shall be addressed on remand, if they remain relevant in light of the disposition of other issues on remand.

IV

Lastly, the Pool asserts that the court erred in denying its motion for summary disposition on the known risk or loss-in-process doctrine. We conclude the court did not err in denying summary disposition where the Michigan courts have yet to apply that doctrine in an environmental dispute, and where there were unresolved factual disputes regarding its applicability.

V

On cross-appeal, the Park asserts that the *Etheridge* trespass and nuisance claims were covered by the policy's personal injury coverage. We disagree.

The personal injury provisions provide coverage for "those sums that the Member becomes legally obligated to pay as Damages because of Personal Injury or Advertising Injury to which this Coverage applies." The policy defines personal injury as injury, other than bodily injury, arising out of several offenses, including wrongful entry into a room, dwelling, or premises that the person occupies, or other invasion of the right of private occupancy. The Park characterizes the *Etheridge* plaintiffs' trespass and nuisance claims as invasions of the right of private occupancy.

Addressing the question "[w]hether a personal injury liability endorsement provides coverage for the pollution claims of private plaintiffs where those claims otherwise are barred by a pollution exclusion clause in a comprehensive general liability policy," this Court in *South Macomb Disposal Authority v American Ins Co*, 225 Mich App 635, 689; 572 NW2d 686 (1997), adopted the reasoning of the United States Court of Appeals for the Sixth Circuit in *Harrow Products, Inc v Liberty Mut Ins Co*, 64 F3d 1015, 1024-1025 (CA 6, 1995). In *Harrow*, the insured claimed that, despite a pollution exclusion clause, the policy covered its claim arising from environmental contamination under the personal injury clause. Applying Michigan law, the *Harrow* court rejected the insured's claim.

Subsequently, the court in *Aetna Casualty & Surety Co v Dow Chemical Co*, 933 F Supp 675 (ED MI, 1996), relied on *Harrow* to reject arguments similar to those the Park makes here. In *South Macomb, supra*, this Court adopted *Harrow*, and reasoned that it would be illogical to conclude that an insurer specifically excluded claims under the comprehensive general liability

provision, only to include them within the personal injury liability endorsement. *South Macomb, supra* at 690. Such an interpretation would neither harmonize conflicts between clauses nor avoid an interpretation that renders the provision unreasonable. *Id*. Therefore, to the extent the pollution exclusion clause bars coverage of claims, the Park may not seek coverage for those claims under the personal injury liability endorsements. *Id*.

VI

The Park also contends that the Pool breached its duty to provide its ultimate coverage decision in a timely manner. We disagree.

The legal relationship underlying a duty may arise by contract – the contract creates the state of things that furnishes the occasion of the tort. *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991), citing *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956). "However, there must be some active negligence or misfeasance that is distinct from the breach of duty owed under the contract." *Antoon, supra* at 595; see also *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). An insurer has a duty to give timely notice to an insured that it is defending the insured's claim under a reservation of rights. *Kirschner, supra* at 596; *Multi-States Transport, Inc v Michigan Mut Ins Co*, 154 Mich App 549, 553-554; 398 NW2d 462 (1986). An insurer also has a duty to defend its insured with the utmost loyalty. *Meirthew v Last*, 376 Mich 33, 38; 135 NW2d 353 (1965). We have not found support for the Park's contention that an insurer, having defended under a reservation of rights letter promptly provided the insured, owes a separate specific fiduciary duty to make its final coverage decision at a particular time. We conclude that the circuit court properly dismissed this claim under MCR 2.116(C)(8) and denied the Park's motion for summary disposition.[15]

We reverse the circuit court's determination that defendant was estopped as a matter of law from asserting the absolute pollution exclusion clause, and remand for further proceedings regarding the applicability of the pollution exclusion to the instant claims, and whether under the facts presented, defendant was estopped from asserting the exclusion. We also direct the court to address the parties' arguments with respect to exclusions (b) and (c) to Coverage D. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jessica R. Cooper

[15] In light of this disposition, we need not address plaintiff's discovery issue.